

(3)
No. 87-1853

**IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987**



**MICHAEL LAURITZEN and
MARILYN LAURITZEN, Individually and doing
business as LAURITZEN FARMS,**

Petitioners,

vs.

**ANNE D. MC LAUGHLIN, Secretary of Labor,
United States Department of Labor,**

Respondent.

**On a petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

**PETITIONERS' BRIEF IN REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION
TO CERTIORARI**

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Dated: September 22, 1988

24pp

TABLE OF CONTENTS

Page

Table of Authorities..... ii

Reply to Respondent's Arguments

- I. THE DIRECT AND IRRECONCILABLE
CONFLICT BETWEEN THE DECISION
BELOW AND DONOVAN v BRANDEL,
736 F2d 1114 (6th CIR 1984)
NECESSITATES REVIEW AND
CLARIFICATION OF THE APPLICABLE
STANDARDS FOR ASCERTAINMENT OF
AN EMPLOYMENT RELATIONSHIP UNDER
THE FAIR LABOR STANDARDS ACT OF
1938, 29 USC §201 ET SEQ..... 4

Conclusion..... 19

1	Table of Contents
2	Reply to Respondent's Remarks
3	THE DIRECT AND INDIRECT EFFECTS OF CERTAIN UNITED STATES ACTIONS ON THE LIFE OF THE UNITED STATES
4	CLASSIFICATION OF THE UNITED STATES
5	THE LIFE OF THE UNITED STATES
6	THE LIFE OF THE UNITED STATES
7	THE LIFE OF THE UNITED STATES
8	THE LIFE OF THE UNITED STATES
9	THE LIFE OF THE UNITED STATES
10	THE LIFE OF THE UNITED STATES
11	THE LIFE OF THE UNITED STATES

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Bartels v Birmingham</u> , 322 US 126, 130 (1946).....	7, 8
<u>Board v Hearst Publications</u> , 322 US 111, 124 (1943).....	12, 13
<u>Brock v Lauritzen</u> , 624 F Supp 966 (E.D. Wis 1985).....	2
<u>Donovan v Brandel</u> , 736 F2d 1114 (6th Cir 1984).....	2-6, 8-12, 14, 16, 17
<u>Donovan v Gillmor</u> , 535 F Supp 154 (ND Ohio 1982).....	18
<u>Goldberg v Whitaker House Corp</u> , 366 US 28, 33 (1960).....	2, 7
<u>Harris v Pennsylvania R Co</u> , 361 US 15, 28 (1959) Harlan, J. Dissenting.....	18
<u>Icicle Seafoods, Inc v Worthington</u> , 475 US 709, 716 (1985) Stevens, J. Dissenting.....	18
<u>Mobil Oil Corp v FPC</u> , 417 US 283, 310 (1973).....	18
<u>Rutherford Food Corp v McComb</u> , 331 US 722 (1946).....	2, 7, 8, 14
<u>Sec'y of Labor, U.S. Dept of Labor v Lauritzen</u> , 835 F2d 1529 (7th Cir 1987).....	1, 6, 8, 9, 10, 11, 18
<u>United States v Silk</u> , 331 US 704 (1946).....	2, 7-10, 12-15

TABLE OF CONTENTS

General - Introduction, 1910-1911	1
General - Introduction, 1912-1913	1
General - Introduction, 1914-1915	1
General - Introduction, 1916-1917	1
General - Introduction, 1918-1919	1
General - Introduction, 1920-1921	1
General - Introduction, 1922-1923	1
General - Introduction, 1924-1925	1
General - Introduction, 1926-1927	1
General - Introduction, 1928-1929	1
General - Introduction, 1930-1931	1
General - Introduction, 1932-1933	1
General - Introduction, 1934-1935	1
General - Introduction, 1936-1937	1
General - Introduction, 1938-1939	1
General - Introduction, 1940-1941	1
General - Introduction, 1942-1943	1
General - Introduction, 1944-1945	1
General - Introduction, 1946-1947	1
General - Introduction, 1948-1949	1
General - Introduction, 1950-1951	1
General - Introduction, 1952-1953	1
General - Introduction, 1954-1955	1
General - Introduction, 1956-1957	1
General - Introduction, 1958-1959	1
General - Introduction, 1960-1961	1
General - Introduction, 1962-1963	1
General - Introduction, 1964-1965	1
General - Introduction, 1966-1967	1
General - Introduction, 1968-1969	1
General - Introduction, 1970-1971	1
General - Introduction, 1972-1973	1
General - Introduction, 1974-1975	1
General - Introduction, 1976-1977	1
General - Introduction, 1978-1979	1
General - Introduction, 1980-1981	1
General - Introduction, 1982-1983	1
General - Introduction, 1984-1985	1
General - Introduction, 1986-1987	1
General - Introduction, 1988-1989	1
General - Introduction, 1990-1991	1
General - Introduction, 1992-1993	1
General - Introduction, 1994-1995	1
General - Introduction, 1996-1997	1
General - Introduction, 1998-1999	1
General - Introduction, 2000-2001	1
General - Introduction, 2002-2003	1
General - Introduction, 2004-2005	1
General - Introduction, 2006-2007	1
General - Introduction, 2008-2009	1
General - Introduction, 2010-2011	1
General - Introduction, 2012-2013	1
General - Introduction, 2014-2015	1
General - Introduction, 2016-2017	1
General - Introduction, 2018-2019	1
General - Introduction, 2020-2021	1
General - Introduction, 2022-2023	1
General - Introduction, 2024-2025	1

Weisel v Singapore Joint Venture,
Inc 602 F2d 1183, 1189 (5th Cir
1979).....19

Wheeler v Hurd, 825 F2d 257, 275
(10th Cir 1987).....13

OTHER AUTHORITIES:

Fair Labor Standards Act of 1938,
29 USC §201.....2, 4

Wojciech w Warszawie, dnia 1918
1918 1918 1918 1918 1918

1918 1918 1918 1918 1918 1918 1918 1918 1918 1918

Wojciech w Warszawie, dnia 1918
1918 1918 1918 1918 1918 1918 1918 1918 1918 1918

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Wojciech w Warszawie, dnia 1918
1918 1918 1918 1918 1918 1918 1918 1918 1918 1918

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**PETITIONERS' BRIEF IN REPLY TO
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Petitioners come before this Court seeking
review of the Seventh Circuit's affirmation¹ of

¹Sec'y of Labor, U.S. Dept of Labor v
Lauritzen, 835 F2d 1529 (7th Cir 1987).

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1951

JOHN EDGAR HOOVER, Petitioner,
v.
JOHN D. LAMBERT, Secretary of Labor,
United States Department of Labor.

Writ of Habeas Corpus.

JOHN D. LAMBERT, Secretary of Labor,
United States Department of Labor.

Respondent.

On a petition for a writ of habeas corpus
in the United States Court of Appeals
for the Second Circuit.

JOHN EDGAR HOOVER, Petitioner,
v.
JOHN D. LAMBERT, Secretary of Labor,
United States Department of Labor.

JOHN EDGAR HOOVER, Petitioner,
v.
JOHN D. LAMBERT, Secretary of Labor,
United States Department of Labor.

JOHN EDGAR HOOVER, Petitioner,
v.
JOHN D. LAMBERT, Secretary of Labor,
United States Department of Labor.

the District Court's adjudication,² by summary judgment, that the relationship between Petitioners and the migrant families who contract to hand harvest Petitioners' pickle crop is one of employment rather than of independent contractor. In their Petition for Certiorari, Petitioners complain that (a) genuine issues of material fact preclude a grant of summary judgment, and (b) the Seventh Circuit misconstrued and misapplied standards promulgated in Rutherford Food Corp v McComb, 331 US 722 (1946), United States v Silk, 331 US 704 (1946), and Goldberg v Whitaker House Corp, 366 US 28, 33 (1960) for ascertaining the presence of an employment relationship within the meaning of the Fair Labor Standards Act of 1938, 29 USC §201, and in so doing created a direct and irreconcilable conflict with the Sixth Circuit decision of Donovan v Brandel, 736 F2d 1114 (6th Cir 1984).

²Brock v Lauritzen, 624 F Supp 966 (E.D. Wis 1985).

Respondents' brief, filed in opposition, details the factual findings recited by the Court of Appeals, and then, in harmony with both lower courts, denies the presence of disputed material facts, contending that such facts as may be in dispute are not outcome determinative in nature.³ Respondent attempts to distinguish the difference in results between Brandel and the decisions below with the argument that the two cases are not "factually identical." Respondent denies any conflict exists between the Sixth and Seventh Circuits, asserting that each Circuit "applied the very same legal principles and specific criteria."⁴

Petitioners will rest on their Petition with respect to whether summary judgment was granted in the face of disputed material facts. It is primarily to demonstrate the lack of merit in Respondent's contention that the two circuits

³Respondent's Brief, pg. 16.

⁴Respondent's Brief, pg. 15.

applied the same legal standard that Petitioners file their brief in reply.

I. THE DIRECT AND IRRECONCILABLE CONFLICT BETWEEN THE DECISION BELOW AND DONOVAN v BRANDEL, 736 F2d 1114 (6th CIR 1984) NECESSITATES REVIEW AND CLARIFICATION OF THE APPLICABLE STANDARDS FOR ASCERTAINMENT OF AN EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT OF 1938, 29 USC §201 ET SEQ.

Respondent disputes the necessity for review by this Court, contending that (a) factual dissimilarity explains the outcome differences⁵ between the decisions below and Brandel and (b) both Circuits, rather than acting in contradiction, "applied the very same principles and specific criteria"⁶ of law. Moreover, Respondent suggests that Brandel will be largely ignored and in its isolation will have little, if any, precedential value.

Respondent's perception of factual dissimilarity between the cases, is not shared

⁵ Respondents brief, pg. 14.

⁶ Respondent's brief, pg. 15.

by the courts below. The Seventh Circuit specifically noted the factual similarity of the present case with Brandel.⁷ We differ, said the Seventh, in that "...we view the factual similarities differently than did the Brandel court."⁸ The District Court distinguished Brandel not because of factual dissimilarity but rather because, in the lower court's opinion, the Brandel perception of facts did not accord with the "...economic reality of migrant cucumber pickers."⁹

If there is a factual difference between the instant case and Brandel, it is quantitative only and attributable to the comprehensive trial record made in Brandel.¹⁰ -- an opportunity wrongfully denied to Petitioners.

⁷ 835 F2d at 1536.

⁸ 835 F2d at 1336.

⁹ 624 F Supp at 969.

¹⁰ Brandel, supra at 1118, 1120.

Judge Easterbrook, in his concurrence¹¹ below, expressed the presence of a conflict between the circuits most succinctly:

... Are cucumber pickers "employees" for purposes of the Fair Labor Standards Act? Donovan v Brandel, 736 F.2d 1114 (6th Cir. 1984), says "no" as a matter of law. My colleagues say "yes" as a matter of law. Both opinions march through seven "factors" - each important, none dispositive.

If then, as Judge Easterbrook observes, and as Respondent contends and Petitioners agree, both circuits paid homage to the same legal principles, the same seven "factors," why the necessity for review?

The necessity for review lies with the fact that the Sixth and Seventh Circuits have given wholly different definition to the applicable legal standards promulgated by this Court such that any similarity of application

¹¹835 F2d at 1539.

exists in name only and not in consequence or results.

This Court has directed that the ultimate question, when considering whether a work relationship is one of employment for purposes of FLSA, is whether, given the circumstances of the whole activity, it is "economically realistic" to view the relationship as one of a dependency upon the business to which services are rendered. United States v Silk, 331 US 704, 713 (1946); Goldberg v Whitaker House Cooperative, 336 US 28, 33 (1961); Rutherford Food Corp v McComb, 331 US 722, 730 (1946); Bartels v Birmingham, 322 US 126, 130 (1946).

To assist courts in resolving this ultimate question, this Court prescribed certain guidelines or evaluation standards, nonexclusive and none by itself controlling. These standards include consideration of the permanency of the relationship, the skill required, the investment in the facilities for work, the opportunity for loss and profit from the

activity involved, the degree of control exercised over the details of the service rendered, the risk undertaken, and the extent of integration of the service rendered into the totality of the business. United States v Silk, supra at 716, 719; Bartels v Birmingham, supra at 130; Rutherford Food Corp v McComb, supra at 729.

Both the Sixth and Seventh Circuit acknowledge these guidelines as their decisional point of departure.¹² The definitions that each Circuit gives to the standards, however, are so unrelated and so divergent as to make wholly fictional any contention that the Circuits use the same scale for weighing a work relation. And it is this difference of definition, Petitioners urge, that warrants, if not compels, the exercise of review and necessitates a revisit to Silk and Rutherford for

¹²Brandel, supra at 1117; 835 F2d at 1535.

purposes of definitional clarification and instruction in technique of application.

And the differences between the two Circuits in definitional application of the standards is wholesale. To illustrate, Petitioners contrast the treatment given several of the standards by the two Circuits:

The Investment factor:

Supreme Court -
never has been clearly
defined

6th Circuit¹³ -
capital necessary for the
task to be performed by
worker

7th Circuit¹⁴ -
capital investment of the
worker relative to the cap-
ital investment of the
whole enterprise

¹³Brandel, supra at 1118.

¹⁴835 F2d at 1537.

The Control factor:

- Supreme Court¹⁵ -
degree of employer control
over how the "work shall be
done"
- 6th Circuit¹⁶ -
degree of employer control
over details of the task
- 7th Circuit¹⁷ -
degree of employer control
of the entire enterprise

The Opportunity for Profit and Loss factor:

- Supreme Court¹⁸ -
opportunity to profit from
"sound management"
- 6th Circuit¹⁹ -
opportunity for profit from
successful management of
the contracted task
- 7th Circuit²⁰ -
return on worker's invested
capital

¹⁵United States v Silk, supra at 714.

¹⁶Brandel, supra at 1119.

¹⁷835 F2d at 1536.

¹⁸United States v Silk, supra at 719.

¹⁹Brandel, supra at 1119.

²⁰835 F2d at 1536.

The General

Supreme Court

Justice of the Peace

San Francisco

County of San Francisco

State of California

Know all men that the above

is a true and correct copy

of the original

as the same appears from the

records of the Court

and the same is

correctly attested

Witness my hand

at San Francisco this

day of

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Skill factor:

Supreme Court - undefined

6th Circuit²¹ -
workers' skill to be evaluated relative to task involved

7th Circuit²² -
worker must possess a high degree of specialized skill

The above illustrations point, partially, to the reason why, when given nearly identical fact situations, the two circuits traveled perpendicular paths to a legal result. And they further illustrate why, unless review is had and clarification given, similar factual situations within the two circuits will continue to experience dissimilar results. Without the intervention of this Court, the process pickle industry within the Sixth Circuit will continue to function as one of independent contractor, with the consequences that attend

²¹Brandel, supra at 1118.

²²835 F2d at 1537, 1541.

such relationship, while the same industry, operating in the same mode within the Seventh Circuit is now classified an employment relationship and sustains the different consequences that attend that classification. The appellate Opinion below is a patent and avowed exercise by the Seventh Circuit in a point-by-point disagreement with Brandel as to proper definition of the applicable legal standards.

This Court has recognized the Congressional desire for national uniformity when testing for employment relationships.²³ This Court also appreciates the difficulty of extracting an exact prescription for defining the limits of an employment relationship.²⁴ And this Court has consistently recognized that it was not the legislative purpose to include within the category of employee all those who may perform service for another or to entirely

²³Board v Hearst Publications, 322 US 111, 124 (1943).

²⁴United States v Silk, supra at 716.

ignore legal classifications made for other purposes.²⁵

Judge Easterbrook, in his concurrence,²⁶ points out ever so acutely that the standards as defined by the 7th Circuit, if given common application, will lay waste to nearly every independent contractor relationship.

Judge Easterbrook's concurrence does more, however, than merely point the precedential problems of the standards as preached by the majority panel. He raises, in bold relief, the proposition that in the case of migrant agricultural workers, where the capital involved is human capital, as a matter of law there can be no independent contractor relationship, a point inferentially, if not explicitly, also urged by

²⁵United States v Silk, supra at 711-714; Board v Hearst Publications, 322 US 111, 124 (1943); see also Wheeler v Hurd, 825 F2d 257, 275 (10th Cir 1987).

²⁶It should be apparent that except as he espoused a per se employee designation for all migrants, and thus concurred in the result below, Judge Easterbrook would have dissented.

Respondent Secretary. The Secretary's territorial push for a per se treatment of the entire migrant agricultural labor force as employees subject to FLSA was recognized in Brandel²⁷ and there denied as a concept inconsistent with the case-by-case approach mandated by this Court in Rutherford.

The phenomenon of a transitory stream of temporary farm labor flowing out of Texas and Florida, north and west, to plant, raise and harvest agricultural products -- primarily fruits and vegetables -- post dates the decisions of the 1940 that framed the standards in use today to evaluate an employment relationship. The labor market contemplated by Silk and Rutherford did not include the migrant labor force. It was primarily a manufacturing and commercial labor environment that was considered relative to the "mischief to be corrected and

²⁷Brandel, supra at 1120.

the end to be attained" of the FLSA.²⁸ This Court had no opportunity to reflect whether the standards then enunciated would be appropriate for a labor force constantly in flux, with a distinctive social and cultural heritage that shaped its employment behavior; doing both skilled and unskilled service for a multiple of employers; sometimes staying the season of a single crop, sometimes only the period of a single harvest, sometimes staying the entire agricultural season; sometimes changing employers daily, sometimes weekly, sometimes monthly; sometimes working as individuals but more often working as a family unit. And, a labor force in which families sometimes assumed responsibility for an entire segment of the farming process -- a segment such as in this case the harvest responsibility.

The 6th Circuit recognized the labor peculiarities of the migrant pickle harvesters and

²⁸United States v Silk, supra at 713.

took those peculiarities into consideration when applying the standards to determine the economic reality of the situation before it.²⁹ The Seventh Circuit majority, however, applied the standards as if dealing with an industrial labor force and consequently, and summarily, relegated all migrants into the coverage under the Act. Judge Easterbrook, alone on the panel, recognized that the standards, as applied below, have little functional relevancy to migrants entrusted with an entire harvest responsibility.

Should this Court refuse to review the decisions below, it jeopardizes, if not wholly disrupts, the traditional industry practice of contracting the entire responsibility of the pickle harvest to skilled migrant families for the economic benefit of all concerned. (Appendix 61a). The instant proceeding, as in Brandel, does not involve employer "mischief" perpetrated on migrant workers contractually

²⁹Brandel, supra, particularly at 1117 and 1119.

unable to fend for their own economic best interests.³⁰ The Seventh Circuit, as the Sixth, could find no social or economic necessity in the context of the facts before them that, of itself, would warrant inclusion within FLSA. With the courts below, it was merely a matter of the mechanical application of standards so narrowly and technically refined as to emasculate even the pretense of economic reality.

Petitioner respectfully submits that the time is ripe, and the need is urgent, that this Court give a rebirth to the standards by which lower courts are to be guided in the ascertainment of employment relationships under FLSA and statutes of like ilk. The migrant labor force now faces a total disfranchisement from independent contractor relationships and suffers the real prospect of a socially demeaning and

³⁰Both Brandel and the decision below recognize the economic benefits to the migrants involved in the independent contractual relationship. Brandel, *supra* at 1120; 835 F2d at 1538.

stereotype classification that condemns them forever as menial labor.

Farm work performed by migrant workers is unskilled labor. There can be no argument to the contrary on this issue.

Donovan v Gillmor, 535 F Supp 154, 162 (ND Ohio 1982)

Where standards have been misapplied or misappended action toward clarification is appropriate, and, Petitioners believe, imperative. Mobil Oil Corp v FPC, 417 US 283, 310 (1973). Icicle Seafoods, Inc v Worthington, 475 US 709, 716 (1985) Stevens, J. Dissenting; Harris v Pennsylvania R Co, 361 US 15, 28 (1959) Harlan, J. Dissenting

As Judge Easterbrook noted below:³¹

...Why keep cucumber farmers in the dark about the legal consequences of their deeds?

People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an

³¹835 F2d, supra at 1539.

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approach under which no one can know where he stands until litigation has been completed. Litigation is costly and introduces risk into any endeavor; we should struggle to eliminate risk and help people save costs.

A plea from Judge Easterbrook, if not a challenge, for the guidance of certiorari and, Petitioners submit, in the context of these cases:

...courts need all the guidance they can get.

Weisel v Singapore Joint
Venture, Inc 602 F2d 1183,
1189 (5th Cir 1979).

CONCLUSION

For these additional reasons, Petitioners pray a writ of certiorari issue to review the judgment and opinion of the Seventh Circuit. In the event that the Petition is granted, Petitioners will pray that the judgment of the Court below be reversed and that the cause

remanded for trial in accordance with the
instructions of this Court.

Respectfully submitted,

DATED: September 22, 1988

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